JD(ATL)–33–03
Cape Coral, FL

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

TNT LOGISTICS OF NORTH AMERICA, INC.

and **CASE 12–CA–22309**

JAMES MORGAN, An Individual

Thomas W. Brudney, Esq.,
for the General Counsel
Mr. James Morgan,
for the Charging Party
John Webb, Esq.,
for the Respondent

BENCH DECISION AND CERTIFICATION

Statement of the Case

KELTNER W. LOCKE, Administrative Law Judge: I heard this case on April 7, 2003 in Fort Myers, Florida. After the parties rested, I heard oral argument, and on April 10, 2003, issued a bench decision pursuant to Section 102.35(a)(1) of the Board's Rules and Regulations, setting forth findings of fact and conclusions of law. In accordance with Section 102.45 of the Rules and Regulations, I certify the accuracy of, and attach hereto as "Appendix A," the portion of the transcript containing this decision.[1] The Remedy, Conclusions of Law, Order and Notice provisions are set forth below.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it

[1] The bench decision appears in uncorrected form at pages 249 through 266 of the transcript. The final version, after correction of oral and transcriptional errors, is attached as Appendix A to this Certification.

must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act, including posting the notice to employees attached hereto as Appendix B. Additionally, Respondent must offer James Morgan immediate and full reinstatement to his former position, or to a substantially equivalent position if his former position does not exist, and make him whole, with interest, for the losses he suffered because of Respondent's unlawful discrimination against him.

CONCLUSIONS OF LAW

1. Respondent, TNT Logistics of North America, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. Respondent interfered with, restrained and coerced employees in the exercise of Section 7 rights, in violation of Section 8(a)(1) of the Act, by telling employees on about June 18, 2002 that it would be futile to select a union as their collective–bargaining representative, by discharging employee James Morgan on about June 18, 2002, and thereafter by failing and refusing to reinstate him.

3. Respondent discriminated in regard to hire or tenure or terms or conditions of employment, in violation of Section 8(a)(3) of the Act, by discharging employee James Morgan on about June 18, 2002, and thereafter by failing and refusing to reinstate him.

4. The acts described in paragraphs 2 and 3 above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

On the findings of fact and conclusions of law herein, and on the entire record in this case, I issue the following recommended[2]

ORDER

1. Respondent, TNT Logistics of North America, Inc., shall cease and desist from

(a) Informing employees that is futile for them to select a union as their collective–bargaining representative.

(b) Discharging or otherwise discriminating, in regard to hire, tenure, or other terms or conditions of employment, against any employee because that employee engaged in union or other concerted activities protected by the Act, or to discourage other employees from engaging in such protected, concerted activities.

[2] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

(c) In any like or related manner –restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer James Morgan immediate and full reinstatement to his former position, or to a substantially equivalent position if his former position does not exist, and make him whole, with interest, for all losses he suffered because Respondent unlawfully discharged him on about June 18, 2002.[3]

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its facilities in Jacksonville and Cape Coral, Florida, and at all other places where notices customarily are posted, copies of the attached notice marked "Appendix B."[4] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees customarily are posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated Washington, D.C.

Keltner W. Locke
Administrative Law Judge

[3] Backpay shall be computed in the manner prescribed in ***F. W. Woolworth Co.***, 90 NLRB 289 (1950), with interest as set forth in ***New Horizons for the Retarded,*** 283 NLRB 1173 (1987).

[4] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading **"POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD"** shall read**, "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."**

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This decision is issued pursuant to Section 102.35(a)(10) and Section 102.45 of the Board's Rules and Regulations. I find that Respondent discharged its employee James Morgan in violation of Section 8(a)(3) and (1) of the National Labor Relations Act, as alleged in the Complaint, because Morgan engaged in union activities protected by the Act.

Procedural History

This case began on June 20, 2002, when James Morgan, whom I will call "Morgan" or the "Charging Party," filed his initial unfair labor practice charge in this proceeding. On June 21, 2002, the Charging Party served this charge on TNT Logistics of North America, Inc., which I will call the "Respondent."

The Charging Party amended this charge on October 18, 2002. On October 23, 2002, after investigation of the charge, the Regional Director of Region 12 of the National Labor Relations Board issued a Complaint and Notice of Hearing, which I will call the "Complaint." In issuing this complaint, the Regional Director acted on behalf of the General Counsel of the Board, whom I will refer to as the "General Counsel" or as the "government."

Admitted Allegations

Based on the admissions in Respondent's Answer, I find that the Charging Party filed and served the original and amended unfair labor practice charges as alleged in the Complaint.

Further, based on Respondent's admissions, I find that at all material times, Respondent has been a Delaware corporation engaged in commerce within the meaning of the National Labor Relations Act. Respondent is engaged in the transportation of goods, and has offices and places of business in various locations, including Jacksonville, Florida and Cape Coral, Florida.

Respondent has admitted, and I find, that the following individuals are its supervisors and agents within the meaning of Sections 2(11) and 2(13) of the Act, respectively: Contract Manager Alan Tishman; Senior Supervisor Michael Bridges; Assistant Supervisor Patrick Callahan.

Respondent has a contract with Home Depot to provide trucking services for its store, and Respondent has an office inside the Home Depot store in Cape Coral, Florida. Two of Respondent's supervisors, Bridges and Callahan, work in this office. The other supervisor mentioned in the Complaint, Contract Manager Tishman, represents Respondent in dealings with Home Depot concerning this contract.

Because Respondent's supervisors had office space inside the Home Depot store itself, the Charging Party could report for work by going to the Home Depot store. Respondent has admitted, and I find, that it discharged the Charging Party on about June 18, 2002. However, Respondent has denied that it acted with unlawful motivation or in violation of the Act.

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Unfair Labor Practice Allegations

The Charging Party began work for Respondent in 1999, as a transport driver assigned to Respondent's Newcastle, Pennsylvania facility. A local of the International Brotherhood of Teamsters represented the Respondent's drivers at this location. Morgan belonged to this union and served on its negotiating committee.

Morgan requested and received a transfer to Respondent's facility at Fort Myers, Florida. Respondent's drivers assigned to this facility are not represented by any union.

In May 2002, two incidents occurred in connection with Morgan's performance of his job duties. The first took place on May 17, when 11 pallets of paving stones ("pavers") fell off the truck he was driving. Management later estimated that this incident cost it $924.80.

On May 22, 2002, Morgan left mortar mix outside a customer's facility. Rain fell on the mix, ruining it. Morgan testified that the customer had given permission for the mix to be left outside. Management later estimated that this incident caused a loss of $258.

Morgan, who had been a Teamsters business agent and organizer at one time, decided to try to get his fellow employees interested in union representation at the Fort Myers facility. When asked when he began this effort, Morgan gave the following testimony:

> About the end of May, actually it was before that but at the end of May I got serious about it because. . .having been in an organizing position in the union I know that when you start stretching things out and if you don't hit real quick with an organizing campaign since retaliatory things can happen by the company. They usually want to quelch an organizing drive by firing the lead man in the organizing drive and that puts a stop to the whole organizing drive either through suspect or through rumor mill.

Morgan's testimony that he "got serious" about union organizing in late May 2002 warrants careful examination. Typically, in a union organizing campaign, one or more employees will obtain authorization cards from a particular union and then ask other employees to sign them. Union officials and supporters devote considerable time and energy to these solicitations because, to obtain a Board–conducted election, they must demonstrate to the Board that at least 30 percent of the employees in the contemplated unit desire an election. See *Statements of Procedure*, Section 101.18(a).

Curiously, the present record does not indicate that Morgan asked any employees to sign anything to demonstrate their interest in an election. As a former Teamsters business agent and organizer, Morgan would be well aware of the Board's "showing of interest" requirement. Indeed, he testified of the need to "hit real quick" in an organizing drive.

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A union organizer conscious of the need for speed presumably would be trying to obtain employee signatures on authorization cards as expeditiously as possible. Therefore, it is rather puzzling that the evidence does not depict Morgan soliciting such signatures.

For that matter, the record does not establish that Morgan obtained blank authorization cards from any specific union or spoke to employees about the advantage of joining any specific union. In the absence of any evidence that Morgan tried to obtain the requisite showing of interest, it is difficult to accept at face value his testimony that he "got serious" about union organizing in late May 2002.

As the quoted excerpt of Morgan's testimony demonstrates, he considered speed desirable to reduce the risk of employer retaliation "by firing the lead man in the organizing drive. . ." In the present case, Morgan was clearly the "lead man in the organizing drive." In fact, the evidence indicates he may have been the *only* person involved in the organizing drive. Morgan's testimony leads to the conclusion that, because of his past experience in union organizing, he was concerned that Respondent might retaliate against him.

It is difficult to square such testimony with Morgan's next action, sending a letter to management announcing his involvement in union activities. Morgan dated the letter June 12, 2002 and sent copies of it to management by fax and regular mail. He also asked another person to deliver a copy of it by hand.

Morgan addressed the letter to Respondent's contract manager, Alan Tishman, and to Supervisor Michael Bridges. The letter states, in all capital letters, as follows:

> THIS LETTER SERVES AS NOTICE TO TNT MANAGEMENT OF MY INTENTIONS ALONG WITH OTHER TNT EMPLOYEES TO FORM A UNION TO NEGOTIATE WITH MANAGEMENT FOR WAGES, BENEFITS, AND WORKING CONDITIONS UNDER THE NATIONAL LABOR RELATIONS ACT (SECTION 7). BY ORGANIZING THE UNION WE ARE PROTECTED FROM BEING FIRED, DISCIPLINED, CUTS IN HOURS OR LAYOFF UNDER EMPLOYER UNFAIR LABOR PRACTICE SECTION 8A(1). [sic]
>
> WE THINK THAT OUR FUTURE AND THE FUTURE OF THE COMPANY WILL BE A BETTER ONE FOR ALL OF US WHEN WE HAVE THE RIGHTS, RESPONSIBILITIES, AND THE NECESSARY CHANGES OUR UNION WILL BRING. WE DO NOT WANT TO GIVE YOU ANOTHER CHANCE TO BE BETTER BOSSES, TO BE NICER TO US AND TO MAKE BETTER DECISIONS FOR US. CERTAINLY, WE WANT YOU TO BE NICER, TO BE BETTER LISTENERS AND COMMUNICATORS, BUT WE ARE NO LONGER PREPARED TO LET YOU HAVE ALL THE REAL DECISION–MAKING POWER! WE HAVE BEEN BURNED TO [sic] MANY TIMES! WE WILL GIVE YOU A CHANCE; HOWEVER, TO BE OUR PARTNERS IN A TRULY NEW ERA THAT WILL BEGIN HERE RIGHT AFTER THE UNION IS CERTIFIED.

Morgan placed a copy of this letter in an envelope, gave it to a person employed by Home Depot as a delivery on–call coordinator with a request that this coordinator deliver it to

Respondent's supervisor, Mike Bridges. The Home Depot coordinator, Len Reynolds, testified that he did not open

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the envelope and did not know the contents of the letter when he delivered it. Reynolds gave it to Bridges on June 13 or 14, 2002.

Morgan also sent copies of this letter to Respondent's management by other means. He mailed it to Respondent on June 13, 2002 and early Friday morning, June 14, 2002, he transmitted a copy to management by facsimile.

Also on Friday, June 14, Morgan was involved in another incident resulting in a loss to Respondent. When he tried to move some Home Depot merchandise, a birdbath, it fell and broke. Respondent later estimated the value of this merchandise at $32.

On Monday morning, June 17, Contract Manager Tishman sent an email to a number of other management personnel. One copy went to Respondent's labor and employment director, Jack Webb. Tishman's email stated as follows:

> One of our drivers, James Morgan, #124004, has had the following cargo claims in the last month. He was issued a verbal warning on 5–27 after the second incident, he had the third on Friday 6–14. Would this be sufficient for termination?
>
> 5–17–02, store 255, pavers not adequately secured, lost load of 11 pallets. Claim $924.80.
>
> 5122–02, store 280, left mortar mix outside without authorization was rained on. Claim $256.00
>
> 6–14–02, store 273, bird bath, repositioned load, it fell off truck. Claim $32.00.

The same day, Labor and Employment Director Webb responded to Tishman's email with the following questions:

> You tell me. Have you terminated drivers from your contract in the past for similar issues?

After reviewing Morgan's work history, Webb agreed with the recommendation to discharge him. A June 18, 2002 letter to Morgan from Contract Manager Tishman memorialized that decision. It stated:

> On Friday, June 14th, while scheduled at Home Depot #273, you caused a cargo claim when you repositioned your load, did not properly secure it properly [sic], and a birdbath fell off the truck. This is your third cargo claim in the last 4 weeks. They are as follows:
>
> May 17, 2001 [sic] at Store 255, pavers were not adequately secured, 11 pallets fell from truck. Claim Total $924.80 May 22, 2001 [sic] at Store 280, mortar mix left outside without authorization, mix was rained on. Claim Total $258.00 June 14, 2001 [sic] at Store 273, birdbath, repositioned load, it fell off the truck. Claim Total: $32.00

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> Based on the frequency and number of claims, your employment with TNT is terminated effective immediately due to unsatisfactory job performance. It is expected that you will turn in all Company property and equipment in your possession.

Although the letter referred to each of the "cargo claims" as arising in 2001, the record makes clear that these were inadvertent errors.

Supervisor Callahan gave this termination notice to Morgan around 4:00 or 5:00 p.m. on June 18, 2002. Morgan testified that before he received this letter, when he and Callahan were walking back towards Callahan's office, they had a conversation. No one else was close enough to hear it.

According to Morgan, he asked the supervisor, "What are you basically calling me in for?" Morgan then added, "Is this involving some discipline?"

When Callahan acknowledged that the meeting concerned discipline, Morgan asserted that he had a ***Weingarten*** right to representation during the disciplinary interview. See generally ***NLRB v. J. Weingarten, Inc.***, 420 U.S. 251 (1975); ***Epilepsy Foundation of Northern Ohio***, 331 NLRB No. 92 (July 10, 2000). Callahan replied that they could delay the meeting while Morgan got a "witness." Morgan then indicated that he did not want to find someone, adding "I don't want to wait. I'm going to file Labor Board charges because I think this is about union activity, and we're trying to form a union and this is what this is all about."

According to Morgan, Callahan told him, "You know you can't have a union here because TNT has a contract with Home Depot that says that unions are disallowed in the operation and they would lose their contract." Morgan replied, "That's irrelevant, has nothing to do with me. . .where did you ever read that?" Morgan quoted Callahan as responding "Well, I didn't read it verbatim but I know that that's the policy they have."

Callahan testified both before and after Morgan took the witness stand, but did not specifically deny making these statements which Morgan attributed to him. I credit Morgan's uncontradicted testimony and find that Callahan did tell him "you can't have a union here because TNT has a contract with Home Depot that says that unions are disallowed in the operation and they would lose their contract."

Complaint paragraph 4 alleges that on or about June 18, 2002, Respondent, by Patrick Callahan, at its location at the Home Depot store in Cape Coral, Florida, told its employees that it would be futile to select a union as their collective bargaining representative. That allegation arises from Callahan's statement that "you can't have a union here" because of Respondent's contract with Home Depot.

Employees reasonably would understand Callahan's statement to mean that if they chose union representation it would put Respondent in breach of its contract with Home Depot and would result in

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the cancellation of the contract. Although Callahan did not explain what would happen should Respondent lose its contract with Home Depot, employees reasonably would conclude that the loss of the contract would result in the loss of jobs.

Such a conclusion is particularly reasonable considering that Respondent located its offices in Home Depot stores. Should Respondent lose its contract with Home Depot, it would in all likelihood lose those offices as well. I find that Callahan's comment interfered with, restrained and coerced employees in the exercise of Section 7 rights.

Respondent stated in oral argument that Callahan had never seen Respondent's contract with Home Depot. It appears that Respondent's counsel is arguing, in essence, not only that Callahan did not know what he was talking about, but also that Callahan's ignorance of this contract was obvious from his own words. In other words, Callahan's statement must be considered self–evident speculation lacking the power to discourage anyone from supporting a union.

The problem with Respondent's argument is that people speaking from ignorance often do so convincingly. Moreover, when a manager makes a statement predicting harm if employees choose union representation, the burden falls on the employer to show that objective facts support the statement. The absence of supporting facts does not take the sting out of an 8(a)(1) violation. Just the opposite is the case.

As already noted, Callahan worked in an office right in the Home Depot store and his duties involved satisfying this customer. Thus, it would be reasonable to assume that he possessed a good working knowledge of the contract he was effectuating. There was no obvious reason to doubt his statement.

In oral argument, Respondent also contended that when Callahan told Morgan that Respondent's contract with Home Depot disallowed unions, Callahan was only speaking on behalf of Home Depot. However, Respondent has admitted that Callahan is its supervisor and agent. Therefore, Callahan's statement is imputable to Respondent and I conclude that Respondent thereby violated Section 8(a)(1) of the Act.

After Callahan made this statement, he and Morgan went into his office, where Supervisor Michael Bridges was waiting. Bridges handed Morgan the letter, signed by Tishman, stating that Morgan had been discharged.

The Complaint alleges that Respondent violated Sections 8(a)(3) and (1) of the Act by discharging Morgan. In analyzing these allegations, I will follow the framework established by the Board in ***Wright Line***, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under ***Wright Line***, the General Counsel must establish four elements by a preponderance of the evidence. First, the government must show the existence of activity protected by the Act. Second, the government must prove that Respondent was aware that the employees had engaged in such activity. Third, the General Counsel must show that the alleged discriminatees suffered an adverse employment action. Fourth, the government must establish a link, or nexus,

between the employees' protected activity and the adverse employment action.

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In effect, proving these four elements creates a presumption that the adverse employment action violated the Act. To rebut such a presumption, the respondent bears the burden of showing that the same action would have taken place even in the absence of the protected conduct. ***Wright Line***, 251 NLRB 1083, at 1089. See also ***Manno Electric, Inc.***, 321 NLRB 278, 280 at fn. 12 (1996).

Clearly, the evidence satisfies the first ***Wright Line*** criterion Notwithstanding my concern that Morgan's testimony may have exaggerated his union activity, this testimony is uncontradicted. Crediting it, I find that Morgan spoke with other employees about working conditions and about organizing a union. Indeed, he even read his June 12, 2002 letter to another employee over the two–way radio.

The record also establishes the second ***Wright Line*** element. Morgan described his union activity in a letter, and the Home Depot on–call coordinator, Len Reynolds, gave a copy to Supervisor Bridges on June 13 or 14, 2002. Moreover, Morgan faxed a copy to management early on June 14, 2002.

Further, the government has proven the third ***Wright Line*** element. Respondent discharged Morgan and discharge certainly constitutes an adverse employment action.

The General Counsel also must establish a link between the discharged employee's protected activity and the adverse employment action. Callahan's violative statement, that Respondent's contract with Home Depot disallowed unions, provides some evidence of hostility towards unionization.

Moreover, the timing of the discharge also suggests a connection between Morgan's protected activity and the decision to terminate his employment. Clearly, when Morgan faxed his letter to Respondent early on Friday, June 14, 2002, management had not yet made a decision to discharge him. Indeed, the Respondent's emails, in evidence as General Counsel's Exhibit 3, establish that on Monday morning, June 17, 2002, management spent a substantial amount of time considering whether to sever this employment relationship.

When management discharged Morgan on June 18, only four days had elapsed from the time Morgan faxed to Respondent the letter announcing his union activities. The timing of the discharge and Callahan's unlawful statement, considered together, satisfy the fourth ***Wright Line*** element.

Because the General Counsel has satisfied all four *Wright Line* criteria, it falls upon Respondent to establish that it would have taken the same action against Morgan in any event, even if he had not engaged in protected activity. In ***Lampi LLC***, 327 NLRB 222 (1998), the Board described how a respondent could satisfy this burden:

To establish an affirmative defense under ***Wright Line*** to a discriminatory discharge

allegation, an employer must do more than show that it had reasons that could warrant discharging the employee in question. It must show by a preponderance of the evidence that it would have done

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> so even if the employee had not engaged in protected activities. In assessing whether the Respondent has established this defense regarding [the alleged discriminatee's] discharge, we do not rely on our views of what conduct should merit discharge. Rather we look to the Respondent's own documentation regarding [the alleged discriminatee's] conduct, to its "Personnel Policy" handbook, and to the evidence of how it treated other employees with recorded incidents of discipline.

327 NLRB at 322–323.

Although Respondent's personal policy handbook – if one exists – is not in evidence, testimony suggests that Respondent had a progressive discipline system in which an employee's first offense drew an oral warning, a second offense resulted in a written warning, and a third offense resulted in discharge. However, the record also indicates that Respondent did not apply this policy consistently in all cases.

Indeed, Supervisor Callahan admitted that he did not give an oral warning for every first infraction. His testimony suggests that he considered it difficult to retain good drivers and therefore did not impose any discipline for first offenses he considered minor. Callahan's departure from the Respondent's disciplinary policy makes it more difficult to determine whether Respondent treated Morgan more severely than other employees with similar work records.

Respondent bears the burden of presenting evidence that it treated Morgan no differently from the way it treated other employees in similar circumstances. It has not presented such evidence. Indeed, with the exception of one exhibit, Respondent did not proffer any documents to establish how it disciplined, or did not discipline, employees with work problems similar to Morgan's.

The General Counsel has introduced into evidence personnel records, subpoenaed from Respondent, concerning how Respondent imposed discipline. There are not enough of these records in evidence to discern a pattern, but to the extent they demonstrate anything about Respondent's personnel practices, they do not support a finding that Respondent would have discharged Morgan in any event.

It cannot be disputed that Morgan had displayed some serious problems. Within a 30–day period, three incidents involving Morgan had cost Respondent more than $1200. However, the evidence falls short of demonstrating that Morgan was to blame for these losses, and he maintained that he was not.

The record in this case does not indicate that Respondent conducted any sort of investigation to determine how much blame should be ascribed to Morgan and how much to other factors. To the extent the evidence allows a conclusion, it appears that management "let slide" the first two of the three incidents rather than imposing discipline in accordance with its official procedure.

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The fact that Respondent took no dramatic action regarding the first two incidents – which cost it more than $1200 – but discharged Morgan after the third incident – which cost it only $32 – is difficult to explain except for the fact that management had become aware of Morgan's union activities right before it decided to discharge him.

Respondent asserted in oral argument that Morgan sent management the letter announcing his union activities so that he could forestall disciplinary action against him. Perhaps. However, his motivation for engaging in protected activity is not relevant, and does not provide a defense.

In applying the ***Wright Line*** standards, I do not sit in judgment of Morgan's merit as an employee or substitute my own standards for those established by the Respondent. Rather, I only must determine whether Respondent has demonstrated that it would have discharged Morgan even in the absence of protected activity.

The General Counsel has established all four ***Wright Line*** elements. This raises a rebuttable presumption of unlawful motivation. I conclude that Respondent has not rebutted the presumption. Therefore, I recommend that the Board find that Respondent violated Section 8(a)(3) and (1) of the Act, as alleged in the Complaint.

When the transcript of this proceeding has been prepared, I will issue a Certification which attaches as an appendix the portion of the transcript reporting this bench decision. This Certification also will include provisions relating to the Conclusions of Law, Remedy, Order and Notice. When that Certification is served upon the parties, the time period for filing an appeal will begin to run.

Throughout this hearing counsel have demonstrated great professionalism and civility, which I truly appreciate. The hearing is closed.

APPENDIX B
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of these rights, guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL NOT tell employees that it is futile for them to select a union as their collective–bargaining representative.

WE WILL NOT discharge or otherwise discriminate against any employee because he formed, joined or assisted a labor organization, engaged in protected concerted activities with other employees for their mutual aid and protection, or to discourage other employees from engaging in such activities.

WE WILL NOT, in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer James Morgan immediate and full reinstatement to his former position, or to a substantially equivalent position if his former position no longer exists, and **WE WILL** make James Morgan whole for all losses he suffered because of our unlawful discrimination against him.

TNT LOGISTICS OF NORTH AMERICA, INC.
Respondent

Dated _____ **By:** _____
(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret–ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

201 East Kennedy Boulevard, South Trust Plaza, Suite 530, Tampa, FL 33602–5824

(813) 228–2641, Hours: 8:00 a.m. to 4:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (813) 228–2662.

The National Labor Relations Board has found that we violated the Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of these rights, guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL NOT tell employees that it is futile for them to select a union as their collective–bargaining representative.

WE WILL NOT discharge or otherwise discriminate against any employee because he formed, joined or assisted a labor organization, engaged in protected concerted activities with other employees for their mutual aid and protection, or to discourage other employees from engaging in such activities.

WE WILL NOT, in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer James Morgan immediate and full reinstatement to his former position, or to a substantially equivalent position if his former position no longer exists, and **WE WILL** make James Morgan whole for all losses he suffered because of our unlawful discrimination against him.

TNT LOGISTICS OF NORTH AMERICA, INC.
Respondent

Dated _____ By: _____
(Representative) (Title)

BENCH DECISION

(Time Noted: 3:40 p.m.)

ADMINISTRATIVE LAW JUDGE LOCKE: On the record.

This decision is issued pursuant to Section 102.3(5)(a)(10) and Section 102.4(5) of the Board's Rules and Regulations.

I find that Respondent discharged its employee, James Morgan, in violation of Section 8(a)(3) and (1) of the National Labor Relations Act, as alleged in the complaint, because Morgan engaged in union activities protected by the Act.

PROCEDURAL HISTORY

This case began on June 20, 2002, when James Morgan, whom I will call Morgan or the Charging Party, filed his initial unfair labor practice charge in this proceeding.

On June 21, 2002, the Charging Party served this charge on TNT Logistics of North America, Inc., which I will call the Respondent. The Charging Party amended this charge on October 18, 2002. On October 23, 2002, after investigation of the charge, the Regional Director of Region 12 of the National Labor Relations Board issued a complaint and Notice of Hearing, which I will call the complaint.

In issuing this complaint, the Regional Director acted on behalf of the General Counsel of the Board, whom I will refer to as the General Counsel or as the Government.

ADMITTED ALLEGATIONS

Based on the admissions in Respondent's answer, I find that

the Charging Party filed and served the original and amended unfair labor practice charges as alleged in the complaint.

Further, based on Respondent's admissions, I find that at all times material, Respondent has been a Delaware corporation engaged in commerce within the meaning of the National Labor Relations Act. Respondent is engaged in the transportation of goods, and has offices and places of business in various locations, including Jacksonville, Florida, and Cape Coral, Florida.

Respondent has admitted and I find that the following individuals are its supervisors and agents within the meaning of Sections 2(11) and 2(13) of the Act, respectively: Contract Manager Alan Tishman, Senior Supervisor Michael Bridges, Assistant Supervisor Patrick Callahan.

Respondent has a contract at Home Depot to provide curtain services for its store, and Respondent has an office inside a Home Depot store in Cape Coral, Florida. Two of Respondent's supervisors, Bridges and Callahan, work in this office. The other supervisor mentioned in the complaint, Contract Manager Tishman, represents Respondent in dealings with Home Depot concerning this contract.

Because Respondent's supervisors had office space inside the Home Depot store, itself, the Charging Party could report for work by going to the Home Depot store. Respondent has admitted and I find that it discharged the Charging Party on

about June 18, 2002; however, Respondent has denied that it acted with unlawful motivation or in violation of the Act.

UNFAIR LABOR PRACTICE ALLEGATIONS

The Charging Party began work for Respondent in 1999 as a transport driver assigned to Respondent's New Castle, Pennsylvania, facility. A local of the International Brotherhood of Teamsters represented the Respondent's drivers at this location. Morgan belonged to this Union and served on its negotiating committee.

Morgan requested and received a transfer to Respondent's facility at Fort Myers, Florida. Respondent's drivers assigned to this facility are not represented by any union.

In May 2002, two incidents occurred in connection with Morgan's performance of his job duties. The first took place on May 17th, when 11 pallets of paving stones, pavers, fell off the truck he was driving. Management later estimated that this incident cost $924.80.

On May 22, 2002, Morgan left mortar mix outside a customer's facility. Rain fell on the mix, ruining it. Morgan testified that the customer had given permission for the mix to be left outside. Management later estimated that this incident caused the lost of $258.00.

Morgan, who had been a Teamsters business agent and organizer at one time, decided to try to get his fellow employees interested in union representation at the Fort Myers

facility. When he began this effort, Morgan gave the following testimony, "About the end of May, actually, it was before that, but at the end of May, I got serious about it. Because, having been in an organizing position in the Union, I know that when you start stretching things out and if you don't get real quick with an organizing campaign, there's retaliatory things can happen by the company. They usually want to crush an organizing drive by firing the lead man in the organizing drive, and that puts a stop to the whole organizing drive, either through suspect or through rumor mill."

Morgan's testimony that he got serious about union organizing in May 2002 warrants careful examination. Typically, in a union organizing campaign, one or more employees will obtain authorization cards from a particular union and then ask other employees to sign them. Union officials and supporters devote considerable time and energy to these solicitations, because to obtain a Board conducted election, they must demonstrate to the Board that at least 30 percent of the employees in the contemplated unit desire an election. See Statements of Procedures, Section 101.1(8)(a).

Curiously, the present record does not indicate that Morgan asked any employees to sign anything to demonstrate their interest in an election. As a former Teamster business agent and organizer, Morgan would be well aware of the Board's showing of interest requirement. Indeed, he testified of the need to

hit real quick in an organizing drive.

A union organizer conscious of the need for speed presumably would be trying to obtain employees' signatures on authorization cards as expeditiously as possible. Therefore, it is rather puzzling that the evidence does not depict Morgan soliciting such signatures. For that matter, the record does not establish that Morgan obtained blank authorization cards from any specific union or spoke to employees about the advantage of joining any specific union.

In the absence of any evidence that Morgan tried to obtain the requisite showing of interest, it is difficult to accept at face value his testimony that he got serious about union organizing in late May 2002.

As the quoted excerpt of Morgan's testimony demonstrates, he considered speed desirable to reduce the risk of employer retaliation by, "by firing the lead man in the organizing drive." In the present case, Morgan was clearly the lead man in the organizing drive. In fact, the evidence indicates that he may have been the only person involved in the organizing drive. Morgan's testimony leads to the conclusion that because of his past experience in union organizing, he was concerned that Respondent might retaliate against him.

It is difficult to square such testimony with Morgan's next action, sending a letter to Management announcing his involvement in union activities. Morgan dated the letter

June 12, 2002, and sent copies of it to Management by fax and regular mail. He also asked another person to deliver a copy of it by hand.

Morgan addressed the letter to Respondent's contract manager, Alan Tishman, and his supervisor, Michael Bridges. The letter states, in all capital letters, as follows:

"This letter serves as notice to TNT Management of my intentions, along with other TNT employees, to form a union, to negotiate with Management for wages, benefits, and working conditions, under the National Labor Relations Act, Section VII.

"By organizing the union, we are protected from being fired, disciplined, cuts in hours, or layoff, under Employer Unfair Labor Practice, Section 8(a)(1). We think that our future and the future of the company will be a better one for all of us when we have the rights, responsibilities, and the necessary changes our union will bring.

"We do not want to give you another chance about this, to be nicer to us and to make better decisions for us. Certainly, we want you to be nicer, to be better listeners and communicators, but we are no longer prepared to let you have all the real decision–making power. We have been burned too many times. We will give you a chance, however, to be our partners in a truly new era that will begin here right after the union is certified."

Morgan placed a copy of this letter in an envelope, gave it

to a person employed by Home Depot as a deliver on–call coordinator, with a request that this coordinator deliver it to Respondent's supervisor, Mike Bridges. The Home Depot coordinator, Ben Reynolds, testified that he did not open the envelope and did not know the contents of the letter when he delivered it. Reynolds gave it to Bridges on June 13 or 14, 2002.

Morgan also sent copies of this letter to Respondent's Management by other means. He mailed it to Respondent on June 13, 2002, and early Friday morning, June 14, 2002, he transmitted a copy to Management by facsimile.

Also on Friday, June 14, Morgan was involved in another incident resulting in a loss to Respondent. When he tried to move some Home Depot merchandise, a bird bath, it fell and broke. Respondent later estimated the value of this merchandise at $32.

On Monday morning, June 17, Contract Manager Tishman sent an email to a number of other Management personnel. One copy went to Respondent's Labor and Employment director, Jack Webb. Tishman's email stated as follows, "One of our drivers, James Morgan, Number 124004, has had the following cargo claims in the last month. He was issued a verbal warning on 5/27 and for the second incident. He had the third on Friday, 6/14. Will this be sufficient for termination? 5/17/02, Store 255, papers not adequately secured, lost load of 11 pallets, claim $924.80.

5/22/02, Store 280, left mortar mix outside without authorization, was rained on, claim $256. 6/14/02, Store 273, bird bath, repositioned load, it fell of truck, claim $32."

The same day, Labor and Employment Director Webb responded to Tishman's email with the following questions, "You tell me? Have you terminated drivers from your contract in the past for similar issues?"

After reviewing Morgan's work history, Webb agreed with the recommendation to discharge him. A June 18, 2002, letter to Morgan from Contract Manager Tishman memorialized that decision. it stated, "On Friday, June 14th, while scheduled at Home Depot Number 273, you caused a cargo claim when you repositioned your load, did not properly secure it properly, and a bird bath fell off the truck. This is your third cargo claim in the last four weeks. They are as follows. May 17, 2001, at Store 255, papers were not adequately secured, 11 pallets fell from truck, claim total $924.80. May 22, 2001, at Store 280, mortar mix left outside without authorization, mix was rained on, claim total $258.00. June 14, 2001, at Store 273, bird bath, repositioned load, and fell off the truck, claim total $32.00. Based on the frequency and number of claims, your employment with TNT is terminated effective immediately due to unsatisfactory job performance. It is expected that you will turn in all company property and equipment in your possession."

Now, although the letter referred to each of the cargo

claims as arising in 2001, the record makes clear that these were inadvertent errors. Supervisor Callahan gave this termination notice to Morgan around 4:00 or 5:00 p.m., on June 18, 2002. Morgan testified that before he received this letter, when he and Callahan were walking back toward Callahan's office, they had a conversation. No one else was close enough to hear it.

According to Morgan, he asked the supervisor, "What are you basically calling me in for?" Morgan then added, "Is this involving some discipline?" When Callahan acknowledged that the meeting concerned discipline, Morgan asserted that he had a Weingarten right to representation during the disciplinary interview. See generally NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975), Epilepsy Foundation of Northern Ohio, 331 NLRB #92 (July 10, 2000).

Callahan replied that they could delay the meeting while Morgan got a witness. Morgan then indicated that he did not want to find someone, adding, "I don't want to wait. I'm going to file Labor Board charges, because I think this is about union activity and we're trying to form a union, and this is what this is all about."

According to Morgan, Callahan told him, "You know you can't have a union here because TNT has a contract with Home Depot that says that unions are disallowed in the operation and they would lose their contract."

Morgan replied, "That's irrelevant, has nothing to do with me. Where did you ever read that?"

Morgan quoted Callahan as responding, "Well, I didn't read it verbatim, but I know that that's the policy they have."

Callahan testified both before and after Morgan took the witness stand, but did not specifically deny making these statements which Morgan attributed to him. I credit Morgan's uncontradicted testimony and find that Callahan did tell him, "You can't have a union here because TNT has a contract with Home Depot that says that unions are disallowed in the operation and they would lose their contract."

Complaint Paragraph 4 alleges that on or about June 18, 2002, Respondent, by Patrick Callahan, at its location at the Home Depot store in Cape Coral, Florida, told its employees that it would be futile to select a union as their collective bargaining representative. That allegation arises from Callahan's statement that, "You can't have a union here," because of Respondent's contract with Home Depot.

Employees reasonably would understand Callahan's statement to mean that if they chose union representation, it would put Respondent in breach of its contract with Home Depot, and would result in the cancellation of the contract. Although Callahan did not explain what would happen should Respondent lose its contract with Home Depot, employees reasonably would conclude that the loss of the contract would result in the loss of jobs.

Such a conclusion is particularly reasonable considering that Respondent located its offices in Home Depot stores. Should Respondent lose its contract with Home Depot, it would in all likelihood lose those offices as well. I find that Callahan's comment interfered with, retrained, and coerced employees in the exercise of Section VII rights.

Respondent stated in oral argument that Callahan had never seen Respondent's contract with Home Depot. It appears that Respondent's counsel is arguing, in essence, not only that Callahan did not know what he was talking about, but also that Callahan's ignorance of this contract was obvious from his own words. In other words, Callahan's statement must be considered self–evident speculation, lacking the power to discourage anyone from supporting a union.

The problem with Respondent's argument is that people speaking from ignorance often do so convincingly. Moreover, when a manager makes a statement predicting harm if employees choose union representation, the burden falls on the Employer to show that objective facts support the statement. The absence of supporting facts does not take the sting out of an 8(a)(1) violation. Just the opposite is the case.

As already noted, Callahan worked in an office right in the Home Depot store and its duties involved satisfying its customer. Thus, it would be reasonable to assume that he possessed a good working knowledge of the contract he was

effectuating. There was no obvious reason to doubt his statement.

In oral argument, Respondent also contended that when Callahan told Morgan that Respondent's contract with Home Depot disallowed unions, Callahan was only speaking on behalf of Home Depot. However, Respondent has admitted that Callahan is a supervisor and agent. Therefore, Callahan's statement is imputable to Respondent, and I conclude that Respondent thereby violated Section 8(a)(1) of the Act.

After Callahan made this statement, he and Morgan went into his office, where Supervisor Michael Bridges was waiting. Bridges handed Morgan the letter signed by Tishman, stating that Morgan had been discharged.

The complaint alleges that Respondent violated Sections 8(a)(3) and (1) of the Act by discharging Morgan. In analyzing these allegations, I will follow the framework established by the Board in Wright Line, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

Under Wright Line, the General Counsel must establish four elements by a preponderance of the evidence. First, the Government must show the existence of activity protected by the Act. Second, the Government must prove that Respondent was aware of the employee's having engaged in such activity. Third, the General Counsel must show that the alleged discriminatees suffered an adverse employment action. Fourth, the Government

must show a link or nexus between the employee's protected activity and the adverse employment action.

In effect, proving these four elements creates the presumption that the adverse employment action violated the Act. To rebut such a presumption, the Respondent bears the burden of showing that the same action would have taken place even in the absence of protected conduct. Wright Line, 251 NLRB 1083, at 1089. See also Manno Electric Inc., 321 NLRB 278, 280, at Footnote 12 (1996).

Clearly, the evidence satisfies the first Wright Line criterion. Morgan spoke with other employees about working conditions and about organizing a union. Indeed, he even read his June 12, 2002, letter to another employee over the two–way radio.

The record also establishes the second Wright Line element, the Home Depot on–call coordinator, Ben Reynolds, gave a copy to Supervisor Bridges on June 13 or 14, 2002. Moreover, Morgan faxed a copy to Management early on June 14, 2002.

Further, the Government has proven the third Wright Line element. Respondent discharged Morgan, and discharge certainly constitutes an adverse employment action.

The General Counsel also must establish a link between the discharged employee's protected activity and the adverse employment action. Callahan's volatile statement that Respondent's contract with Home Depot disallowed unions provides

some evidence of hostility towards unionization. Moreover, the timing of this discharge also suggests the connection between Morgan's protected activity and the decision to terminate his employment.

Clearly, when Morgan faxed his letter to Respondent early on Friday, June 14, 2002, Management had not yet made a decision to discharge him. Indeed, the Respondent's email, in evidence as General Counsel's Exhibit 3, established that on Monday morning, June 17, 2002, Management spent a substantial amount of time considering whether to sever this employment relationship.

When Management discharged Morgan on June 18, only four days had elapsed from the time Morgan faxed to Respondent the letter announcing his union activities. The timing of the discharge and Callahan's unlawful statement, considered together, satisfy the fourth Wright Line element.

Because the General Counsel has satisfied all four Wright Line elements, it falls upon Respondent to establish that it would have taken the same action against Morgan in any event, even if he had not engaged in protected activity.

In Lampi, LLC, 327 NLRB 51 (November 30, 1998), the Board described how a Respondent could satisfy this burden. "To establish an affirmative defense under Wright Line to a discriminatory discharge allegation, an Employer must do more than show it has reasons that could warrant discharging the employee in question. It must show by a preponderance of the

evidence that it would have done so even if the employee had not engaged in protected activities.

"In assessing whether the Respondent has established this defense regarding the alleged discriminatee's discharge, we do not rely on our views of what conduct should merit discharge. Rather, we look to the Respondent's own documentation regarding the alleged discriminatee's conduct, to its Personnel Policy handbook, and to the evidence of how it treated other employees with recorded incidents of discipline."

Although Respondent's Personnel Policy handbook, if one exits, is not in evidence, testimony suggests that Respondent had a progressive disciplinary system in which an employee's first offense drew an oral warning, a second offense resulted in a written warning, and a third offense resulted in discharge.

However, the record also indicates that Respondent did not apply this policy consistently in all cases. Indeed, Supervisor Callahan admitted that he did not give an oral warning for every first infraction. His testimony suggests that he considered it difficult to obtain good drivers and, therefore, did not impose any discipline for first offenses he considered minor.

Callahan's departure from the Respondent's disciplinary policy makes it more difficult to determine whether Respondent treated Morgan more severely than other employees with similar work records.

Respondent bears the burden of presenting evidence that it

treated Morgan no differently from the way it treated other employees in similar circumstances. It has not presented such evidence. Indeed, with the exception of one exhibit, Respondent did not proffer any documents to establish that it disciplined or did not discipline employees with work problems similar to Morgan.

The General Counsel has introduced into evidence personnel records subpoenaed from Respondent concerning how Respondent imposed discipline. There are not enough of these records in evidence to discern a pattern. But to the extent they demonstrate anything about Respondent's personnel policies, they do not support a finding that Respondent would have discharged Morgan in any event.

It cannot be disputed that Morgan had displayed some serious problems. Within a 30–day period, 3 incidents involving Morgan had cost Respondent more than $1,200.00. However, the evidence falls short of demonstrating that Morgan was to blame for these losses, and he maintained that he was not. The record in this case did not indicate that Respondent conducted any sort of investigation to determine how much blame should be ascribed to Morgan and how much to other facts.

To the extent the evidence allows the conclusion, it appears that Management let slide the first of the three incidents, rather than imposing discipline in accordance with its official procedure.

The fact that Respondent took no dramatic action regarding the first two incidents, which cost it more than $1,200, but discharged Morgan after the third incident, which cost it only $32, it is difficult to explain, except for the fact that Management had become aware of Morgan's union activities right before it decided to discharge him.

Respondent asserted in oral argument that Morgan sent Management the letter announcing his union activities so that he could forestall disciplinary action against him, perhaps. However, his motivation for engaging in protected activity is not relevant and does not provide a defense.

In applying the Wright Line standards, I do not sit in judgment of Morgan's merit as an employee or substitute my own standards for those established by the Respondent. Rather, I only must determine whether Respondent has demonstrated that it would have discharged Morgan even in the absence of protected activity.

The General Counsel has established all four Wright Line elements. This raises the rebuttable presumption of unlawful motivation. I conclude that Respondent has not rebutted the presumption. Therefore, I recommend that the Board find that Respondent violated Section 8(a)(3) and (1) of the Act, as alleged in the complaint.

When the transcript of this proceeding has been prepared, I will issue a certification, which attaches as an appendix, the

portion of the transcript reporting this Bench Decision. This certification also will include provisions relating to the findings of the facts, conclusions of law, remedy order, and notice.

When that certification is served upon the parties, the time period for filing an appeal will begin to run. Throughout this hearing, counsel have demonstrated a great professionalism and civility, which I truly appreciate. The hearing is closed.

Off the record.

(Whereupon, at 4:05 p.m., the hearing in the above–entitled matter was closed.)

CERTIFICATION

This is to certify that the attached telephonic proceedings before the National Labor Relations Board (NLRB), Region 12, in the matter of TNT LOGISTICS OF NORTH AMERICA, INC., Case No. 12–CA–22309, on April 10, 2003, were held according to the record, and that this is the original, complete, and true and accurate transcript that has been compared to the reporting or recording, accomplished at the hearing, that the exhibit files have been checked for completeness and no exhibits received in evidence or in the rejected exhibit files are missing.

_____
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_____
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